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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1989

STEPHEN D. LEARNED,

Petitioner,

v.

CITY OF BELLEVUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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27 pp

QUESTIONS PRESENTED

1. Whether a conflict in the United States Courts regarding the question of the basis of retaliation under Title VII of the Civil Rights Act should be decided by this Court?

2. Whether the practice opposed under the "opposition clause" of Title VII, Section 704(a) must be a violation of the Act to sustain a federal action for retaliation or whether it can be based upon the reasonable belief of the employee at the time he files his discrimination claim with the state and federal agencies?

3. Whether the decision below is in conflict with other federal courts?

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Robert H. Stevenson, on behalf of Stephen D. Learned, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, (Appendix A) is reported at 860 F² 928 (9th Cir. 1988).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on November 3, 1988. The jurisdiction of this Court is invoked under 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 704(a) of the Civil Rights Act of 1964, 42 USC §2000(e)-3(a) is the primary source of protection against retaliation by an employer against an employee for those who oppose discrimination or participate in a Title VII process:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees....because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated

in any manner in an investigation, proceeding or hearing under this title."

STATEMENT

Stephen D. Learned has been employed by the City of Bellevue, Washington since 1975. In 1977 he was promoted to "crew leader" and supervised from three to ten persons responsible for the maintenance and upkeep of the city's parks and trees.

Learned was stabbed by a co-employee while on his job in May of 1978. He suffered serious injuries, requiring hospitalization and plastic surgery. He received some minor industrial insurance benefits from the State of Washington and returned to his job in June of 1978. His industrial injury claim was closed in October of 1980.

In September of 1982, Learned sought to reopen his claim and sued the City of Bellevue for "excess damages" allowed under the Workmen's Compensation Act. The action required proof of

intentional conduct on the part of the city. The action was eventually dismissed because of the running of the statute of limitations.

After the suit was dismissed, Learned began suffering all sorts of dissatisfaction with his work. He was harassed by charges of negligence and misconduct and given special rules regarding recreational and eating breaks. His responsibilities as a crew leader were dramatically reduced. He developed an ulcer and began to be treated by a psychiatrist. The City harassed him concerning his medical appointments and created a special rule for documentation and notice of all medical appointments. Learned's supervisors referred to him as "crazy" or "sick".

In October of 1982 Learned filed a Complaint with the Washington State Human Rights Commission (HRC). He alleged discrimination based on his physical and mental problems in violation of state law. He also charged retaliatory conduct on the part of the City for filing a Workmen's Compensa-

tion action against it in September of 1982. A second Complaint was filed by Learned with HRC, alleging retaliatory conduct of the City, based upon his suit against the City and having filed his first Complaint with HRC. The retaliatory conduct continued and, in November of 1983, Learned filed a third Complaint with HRC, alleging retaliatory conduct.

In each complaint with HRC, Learned checked a box on the agency's form which stated:

> "I also allege a violation of Title VII of the Civil Rights Act of 1964 and request that this Complaint be filed with the U.S. Employment Opportunity Commission."

In April of 1984, the HRC found reasonable cause to believe that Learned's allegations were true. HRC never forwarded a copy of its complaint to the Equal Employment Opportunity Commission (EEOC) and Learned did not pursue his charges with EEOC.

Learned filed his action in the present case

with the United States District Court in Seattle, Washington. He alleged discrimination against him in violation of Title VII, 42 U.S.C. 2000e-3(a), among other allegations. The Court granted the City's motion for summary judgment with respect to all federal claims alleged in the Complaint and dismissed Learned's pendent claims for relief under the state statutes.

Learned appealed his dismissal to the United States Ninth Circuit Court of Appeals. On November 3, 1988, that Court entered judgment affirming the trial court's dismissal. [860 F^2 928 (9th Cir. 1988)].

REASONS FOR GRANTING THE WRIT

This case presents an important federal question under Title VII of the Civil Rights Act which answers are now in conflict among the Federal Circuit and District Courts, i.e., must the conduct which is opposed actually violate Title VII to sustain a federal claim of employer retaliation?

The Ninth Circuit Court of Appeals has said "yes" to this question on occasion (Silver v. KCA, Inc., 586 F² 138, 18 FEP 1199, 9th Cir. 1978), and on others has said "no" (Sias v. City Demonstration Agency, 588 F² 692, 18 FEP 981, 9th Cir. 1978).

Other Federal Circuit Courts giving a "no" answer to this question are:

1. Fifth Circuit - DeAnda v. St. Joseph Hospital, 671 F² 850, 28 FEP 317 (1982); Payne v. McLemore's Wholesale & Retail Stores, 654 F² 1130, 26 FEP 1500 (1981).

2. Seventh Circuit - Rucker v. Higher Educ. Aids Bd., 669 F² 1179, 27 FEP 1553 (1982); Berg v. LaCrosse Cooler Co., 612 F² 1041, 21 FEP 1012 (1980).

3. First Circuit - Monterio v. Poole Silver Co., 615 F² 4, 22 FEP 90 (1980).

4. Tenth Circuit - Love v. Re/Max of Am., Inc., 738 F² 383, 35 FEP 565. (1984).

5. Miscellaneous - Zack v. City of Minnea-

polis, 35 FEP 1672 (D. Minn. 1984); Croushorn v. Board of Trustees of the Univ. of Tenn., 518 FS 9, 30 FEP 168 (M.D. Tenn. 1980).

Those courts answering "yes" to the question are:

1. Ninth Circuit - (different panel of the Ninth Circuit) - Silver v. KCA, supra.

2. Miscellaneous - EEOC v. C & D Sportswear Corp., 398 FS 300, 10 FEP 1131 (M.D. Ga., 1975); Winsey v. Pace College, 394 FS 1324, 10 FEP 829 (S.D.N.Y., 1975).

An analysis of §704(a) of Title VII recognizes two different clauses:

A. the "opposition" clause under which an employee may oppose any practice made an unlawful employment practice by Title VII; or

B. the "participation" clause under which an employee has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII.

The "participation" clause provides excep-

tionally broad protection and extends to any person who has participated in any manner in a Title VII proceeding. This includes employees who have followed Title VII's provisions with respect to state proceedings. EEOC v. Kallir, Phillips, Ross, Inc., 401 FS 66, 11 FEP 241 (S.D.N.Y. 1975), relief determined 420 FE 919, 13 FEP 1508 (1976), cert. den. 434 U.S. 920 (1977).

The Ninth Circuit, in the present case, held that Learned could not come under the "participation" clause because he didn't allege the type of discrimination prohibited by Title VII - sex, religion, color, race, or national origin (42 U.S.C.2000(e)(2). The Court said that even the filing of Title VII charges with HRC of the State of Washington accompanied by the checking of the referral to the EEOC was insufficient because Learned did not have a "valid Title VII claim". (see page 932).

The Court dismissed the claim under the

"opposition" clause on the basis of the same rationale - the retaliation was not based upon a valid Title VII claim because Learned never alleged that he ever opposed any discrimination based upon race, color, religion, or national origin. (see page 932).

The Ninth Circuit is divided on the issue of whether the practice opposed must be a valid one under Title VII. In Sias it held that an employee was entitled to the "opposition" clause protection so long as he had a reasonable belief that the practice violated Title VII. It is not necessary that the belief be true in fact or in law.

But in Silver, a different panel of the Ninth Circuit held that the claim must be a valid one opposed under Title VII.

In the present case, the Court analyzed Learned's reasonable belief that a Title VII practice had been opposed by testing what Learned alleged in his Complaint rather than what Learned

believed to be true when he filed his three discrimination claims with HRC, checking the EEOC box referral each time.

If the analysis of a valid claim depends upon allegations in a Complaint, the Court's holding that a reasonable belief on the part of the employee is all that is necessary, the Civil Rights Act would be chilled. In the present case, Learned asserts that he had a reasonable belief that the City's harassment of him was retaliation against him for filing charges with the EEOC and HRC, Under some Circuits this would suffice. Under others it would not.

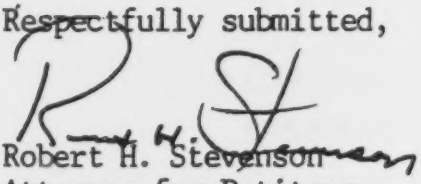
Because of this conflict, this Court should review the present case and grant the petition for a Writ of Certiorari.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Dated this 12th day of January, 1989.

Respectfully submitted,



Robert H. Stevenson
Attorney for Petitoner

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STEPHEN D. LEARNED, *Plaintiff-Appellant,* v. CITY OF BELLEVUE, *Defendant-Appellee.*	No. 87-3825 D.C. No. C84-875D OPINION

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
February 2, 1988—Seattle, Washington

Filed November 3, 1988

Before: Betty B. Fletcher and Harry Pregerson,* Circuit Judges, and Lloyd D. George,** District Judge.

Opinion by Judge George

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*The Honorable Harry Pregerson, United States Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, was drawn to replace Judge Anderson, who was on the original panel but died before this opinion was filed.

**The Honorable Lloyd D. George, United States District Judge, District of Nevada, sitting by designation.

Appendix A

SUMMARY

Civil Rights/Employment Discrimination

Affirming a grant of summary judgment, the court held that appellant did not produce any evidence which could establish a violation of any rights under Title VII or any protected interest under 42 U.S.C. § 1983.

Appellant Stephen Learned appeals the grant of summary judgment in favor of his employer, appellee City of Bellevue, on Learned's claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, section 704(a), 42 U.S.C. 2000e-3(a), and the fourteenth amendment to the United States Constitution. Learned's favorable employment evaluations and positive working relationship with his superiors deteriorated after he sought to re-open his industrial insurance claim. He sued his employer for excess damages, although the suit was ultimately dismissed as untimely. Soon after filing suit, Learned experienced problems at work. His employer thereafter allegedly harassed him. Learned ultimately filed three complaints with the Washington Human Rights Commission (HRC) alleging discrimination on the basis of physical and mental limitations in violation of state law. The HRC found reasonable cause to believe that Learned's allegations were true. Although he never received a right-to-sue letter, he filed this action in federal court. The district court granted Bellevue's motion for summary judgment because the court found that the evidence did not support a deprivation of due process or equal protection, or a viable claim under Title VII.

[1] 42 U.S.C. 2000e-3, section 704(a)'s opposition clause protects only those employees who oppose what they reasonably perceive as discrimination *under the Civil Rights Act.* [2] Learned did not allege that he ever opposed any discrimination based upon race, color, etc. Any retaliation in this case

related to Learned's having filed a claim for excess damages under state industrial insurance laws and Learned's opposition to what he believed was discrimination based upon physical and mental limitations only. Learned could not reasonably have believed that Bellevue discriminated against him in violation of Title VII, and therefore, he cannot claim that he was retaliated against for opposing discrimination prohibited by Title VII. [3] The HRC filing does not fall within the protection of section 704(a) in this case because Learned did not allege discrimination prohibited by Title VII. Therefore, the district court properly granted summary judgment as to this claim. [4] Although injury to reputation may implicate a constitutional liberty interest, [5] the facts in this case do not constitute such a deprivation of liberty. [6] Further, Learned did not produce any evidence that he had a protected property interest in his employment, and therefore, he cannot claim that he was denied property without due process of law.

COUNSEL

Robert Schmitt, Seattle, Washington, for the plaintiff-appellant.

Richard L. Kirkby, City of Bellevue, Bellevue, Washington, for the defendant-appellee.

OPINION

GEORGE, District Judge:

Learned appeals the grant of summary judgment in favor of his employer, the City of Bellevue (Bellevue), on Learned's claims under the Civil Rights Act of 1871, 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, section 704(a), 42

U.S.C. 2000e-3(a), and the fourteenth amendment to the United States Constitution. We conclude that summary judgment was proper and affirm the judgment.

FACTS AND PROCEEDINGS BELOW

Learned has been employed by the City of Bellevue in the Parks and Recreation Department since 1975. In 1977, Learned was promoted to "crew leader" where he supervised three to ten persons responsible for the maintenance of street trees. Learned enjoyed favorable employment evaluations and a positive working relationship with his superiors.

In May 1978, Learned was stabbed by a co-worker while in the course of his employment. Learned suffered serious injuries requiring hospitalization and plastic surgery, for which he received industrial insurance medical benefits from the State of Washington. Learned returned to work in June 1978, and in October 1980, his industrial insurance claim was closed. In September 1982, however, Learned sought to re-open his claim. Learned sued his employer for "excess damages" under an industrial insurance statute. The action would have required proof of intentional injury on behalf of Learned's employer, but the suit was ultimately dismissed as untimely.

Soon after filing suit, Learned experienced "problems" at work. Learned was assigned a new supervisor who was dissatisfied with Learned's work. Learned was allegedly harassed with charges of negligence and misconduct and given special rules regarding breaks. His responsibilities as crew leader were dramatically decreased. Learned developed an ulcer and began to see a psychiatrist. His employer thereafter allegedly harassed him about his medical appointments and made a special rule for Learned regarding notice and documentation of all medical appointments. In addition, Learned alleged that his supervisors referred to him as "crazy" or "sick" when conversing with co-workers.

In October 1982, Learned filed a complaint with the Washington Human Rights Commission (HRC) alleging discrimination on the basis of physical and mental limitations in violation of state law. He also charged retaliatory conduct, but later withdrew that charge. At the bottom of the complaint, Learned checked a box that said:

> "I also allege a violation of Title VII of the Civil Rights Act of 1964 and request that this Complaint be filed with the U.S. Employment Opportunity Commission."

When Learned's supervisors continued to "harass" him and treat him differently than they did other employees, Learned filed a second complaint with the state HRC alleging retaliatory conduct for Learned's having filed the first HRC complaint and his suit for excess damages. Again, Learned checked the box with the provision quoted above. In November 1983, Learned filed a third complaint with the HRC alleging retaliatory conduct and checking the box quoted above. Three months later, Learned "voluntarily" transferred to the ballfield maintenance division where his title and salary have remained the same, but his responsibilities have diminished.

In April 1984, following an investigation of the matter, the HRC found reasonable cause to believe that Learned's allegations were true.[1] Learned did not pursue the matter by filing a charge with the Equal Employment Opportunity Commission (EEOC), and apparently the HRC never forwarded a copy of Learned's complaint to the EEOC as requested on the HRC form complaint. Consequently, Learned never received a right-to-sue letter from the EEOC. Nevertheless, Learned thereafter filed this action in the United States District Court for the Western District of Washington.

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[1]Through discovery, Learned obtained evidence that Bellevue was attempting to "build a case" against and "dump" him because he was "irrational"and had become a "liability" to Bellevue.

Learned alleged that Bellevue discriminated against him in violation of section 704 (a) of Title VII, 42 U.S.C. 2000e-3,[2] and deprived him of his civil rights under the fourteenth amendment in violation of 42 U.S.C. 1983. The district court granted Bellevue's motion for summary judgment because the court found that the evidence did not support a deprivation of due process or equal protection, or a viable claim under Title VII. Because the summary judgment pertained to all federal claims alleged in the complaint, the court dismissed Learned's pendent claims for relief. Learned does not challenge the dismissal of his pendent state claims.

DISCUSSION

We review a grant of summary judgment *de novo*. *Salgado v. Atlantic Richfield Co.*, 823 F.2d 1322, 1324 (9th Cir. 1987). Viewing the evidence in the light most favorable to the nonmoving party, we must determine whether there is a genuine issue as to any material fact and, if not, whether the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); *Idaho v. Hodel*, 814 F.2d 1288, 1292 (9th Cir.), *cert. denied sub nom. Coeur D'Alene Tribe of Indians v. Idaho*, 108 S. Ct. 159 (1987).

I. TITLE VII

Bellevue argued for the first time on appeal that Learned's Title VII claims are barred because Learned did not file a complaint with and did not receive notice of a right-to-sue from the EEOC as required under 42 U.S.C. section 2000e-5 (e) and (f)(1). Learned's failure to comply with the statutory prerequisites may or may not affect jurisdiction under Title

[2]Bellevue contends that Learned did not allege a claim for relief under Title VII. While the allegations are certainly equivocal, a liberal construction of the complaint with the incorporated HRC complaints supports Learned's position that he alleged a claim, however deficient, under Title VII, and that Bellevue had sufficient notice thereof.

VII. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982)(filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit against a private-sector employer in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel and equitable tolling); *accord EEOC v. Nevada Resort Ass'n*, 792 F.2d 882, 887 (9th Cir. 1986); *but see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973)(filing charges with the EEOC and receiving notice of the right-to-sue are jurisdictional prerequisites to filing suit in federal court); *Baldwin Co. Welcome Center v. Brown*, 466 U.S. 147, 152 n.6 (1984)(per curiam)(the Court did not declare in *Zipes* that the EEOC filing requirement need not ever be satisfied, but rather held that timely filing is subject to waiver and tolling); *see also Jones v. Truck Drivers Local Union No. 299*, 748 F.2d 1083, 1086 (6th Cir. 1984)(filing a complaint with the EEOC is a necessary, jurisdictional prerequisite to suit in federal court; only the timeliness of the filing may be waived or tolled); *Worrell v. Uniforms to You & Co.*, 673 F. Supp. 1461, 1462-64 & 1462 n.3 (N.D. Cal. 1987)(*Zipes* governs the time requirement, not the exhaustion requirement); *accord Hrivnak v. First of Michigan Corp.*, 617 F. Supp. 990, 990-92 (E.D. Mich. 1985); *Bennett v. Russ Berrie and Co.*, 564 F. Supp. 1576, 1580 (N.D. Ind. 1983); *Perez v. Dana Corp.*, 545 F. Supp. 950, 952-53 (E.D. Penn. 1982), *aff'd on other grounds*, 718 F.2d 581 (3d Cir. 1983). While we may consider jurisdictional issues raised for the first time on appeal, *Csibi v. Fustos*, 670 F.2d 134, 136 n.3 (9th Cir. 1982), we need not decide the issue in this case because we determine in any event that Learned did not produce evidence of, much less allege, a cognizable claim under Title VII.

Learned contends that the district court erred in granting summary judgment on his "claim" under the anti-retaliation provision of Title VII, section 704(a), 42 U.S.C. 2000e-3. Section 704(a) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer to discriminate against any of his

> employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C.A. 2000e-3 (West 1981). Learned contends that his employer's conduct violated both the "opposition clause" and the "participation clause" contained in section 704(a).

A. *The "Opposition Clause"*

[1] Although courts liberally construe the provisions of section 704(a) to effectuate the remedial purposes of the Act, *see, e.g., Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978), the opposition clause, by its terms, protects only those employees who oppose what they reasonably perceive as discrimination *under the Act*. An employee need not establish that the opposed conduct in fact violated the Act in order to establish a valid claim of retaliation. *Id.* That is, an employee may fail to prove an "unlawful employment practice" and nevertheless prevail on his claim of unlawful retaliation. However, the opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation. *Silver v. KCA, Inc.*, 586 F.2d 138, 142 (9th Cir. 1978)("under the clear language of the "opposition" clause of [section] 704(a), a case of retaliation has not been made out unless the "retaliation" relates to the employee's opposition to a [section] 703 violation"); *see also Sias*, 588 F.2d at 695-96 ("[a]lthough the [district] court made no explicit finding that Sias' opposition was based on a reasonable belief that the City's employment practices violated Title VII, such a finding is implicit here")(footnote omitted).

[2] Learned did not allege that he ever opposed any discrimination based upon race, color, religion, sex, or national origin. Any retaliation in this case related to Learned's having

filed a claim for "excess damages" under state industrial insurance laws and Learned's opposition to what he believed was discrimination based upon physical and mental limitations only. Learned could not reasonably have believed that Bellevue discriminated against him in violation of Title VII, and therefore, he cannot claim that he was retaliated against for opposing discrimination prohibited by Title VII.

B. *The "Participation Clause"*

The participation clause is broadly construed to protect employees who utilize the tools provided by Congress to protect their rights. *Sias*, 588 F.2d at 695. As with the opposition clause, it is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation. *Id.* "If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled." *Id.* (citation omitted).

[3] The mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination, however, does not automatically trigger the protection afforded under section 704(a); the underlying discrimination must be reasonably perceived as discrimination prohibited by Title VII. *See generally*, G. Rutherglen, *Major Issues in the Federal Law of Employment Discrimination* 47-48 (Federal Judicial Center 1987). Thus, even if the filing of Title VII charges with a state agency such as the HRC could be construed as participation in an investigation, proceeding, or hearing under Title VII, *see Hicks v. ABT Assocs.*, 572 F.2d 960, 968-69 (3d Cir. 1978), the HRC filing does not fall within the protection of 704(a) in this case because Learned did not allege discrimination prohibited by Title VII. Because Learned did not produce any evidence of, or even allege, a valid Title VII claim, we conclude that the district court properly granted summary judgment as to this claim.

II. SECTION 1983

To establish liability under 42 U.S.C., section 1983, a plaintiff must demonstrate 1) that the defendant acted under color of state law, and 2) that the defendant deprived the plaintiff of a right secured by the Constitution or laws of the United States. 42 U.S.C.A. 1983 (West 1981). A municipality may be liable under section 1983 when a city employee violates some federally protected right while implementing or executing a policy, statement, ordinance, regulation, or decision officially adopted and promulgated by city officials. *Monell v. New York Dept. of Soc. Serv.*, 436 U.S. 658, 690-91 (1978).

Learned based his section 1983 claims upon the purported violation of Title VII and alleged violations of the fourteenth amendment to the United States Constitution. Because we determine that Learned did not produce evidence that would support any of the claimed violations, we need not decide whether Learned's superiors acted pursuant to some official city policy.

A. *Title VII Predicate*

Had Learned's discrimination and retaliation claims been cognizable under Title VII, he probably could not have pursued section 1983 claims based upon the same discriminatory and retaliatory acts. Violation of rights *created* by Title VII cannot form the basis of section 1983 claims. *See Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366, 378 (1979). However, since Learned did not demonstrate a violation of any rights under Title VII, we need not consider that statute's preclusive effect. Instead, we may proceed to consider the section 1983 claims that are predicated on the fourteenth amendment.

B. *Fourteenth Amendment Predicate*

Learned contends that Bellevue deprived him of property and liberty without due process of law, citing only one case in

support of his position: *Owen v. City of Independence*, 445 U.S. 622 (1980). No property interest was involved in *Owen*. However, in dicta, the Supreme Court agreed with the Eighth Circuit's conclusion that the plaintiff was deprived of liberty without due process of law when the plaintiff's employer terminated and publicly stigmatized the plaintiff, damaging his reputation in the community, without notice or an opportunity to clear his good name. *Id.* at 633 n.13.

[4] We have recognized that, in certain circumstances, injury to reputation may implicate a constitutional liberty interest. *See Fleming v. Department of Public Safety*, 837 F.2d 401, 409 n.10 (9th Cir. 1988). However, we have limited such recognition to those instances "where an employee has been dismissed, and the reasons for dismissal have so stigmatized the person that his other employment opportunities have been jeopardized." *Id.*; *Clemente*, 766 F.2d at 1366; *see also Paul v. Davis*, 424 U.S. 693, 710-12 (1976) (defamatory remarks, unless accompanied by employment termination or a "significant alteration of status," do not violate the fourteenth amendment).

[5] The facts in this case are not nearly as egregious as those in *Owen*, and as a matter of law do not constitute a deprivation of liberty. Learned is still employed by Bellevue's Parks and Recreation Department. He maintains the same salary and title that he enjoyed before the events leading to this action. Learned's supervisors did not "publicly" stigmatize Learned; any defamatory remarks that may have been made did not go beyond others employed by the Department and would not interfere with Learned's liberty to pursue the career of his choice. Therefore, Learned's liberty claim must fail.

[6] Learned did not produce any evidence that he had a protected "property interest" in his employment, and therefore, he cannot claim that he was denied property without due process of law. *See Merritt v. Mackey*, 827 F.2d 1368, 1370-71

(9th Cir. 1987); *see also McAdoo v. Lane*, 564 F. Supp. 1215, 1221 (N.D. Ill. 1983), *aff'd without opinion, McAdoo v. Thomas*, 774 F.2d 1168 (7th Cir. 1985) (because plaintiff had a protected property interest in his employment, he could pursue his claim that he was deprived of property without due process of law when his superiors harassed him until he gave up his job).

Learned did not specifically challenge the district court's ruling that there was no evidence of any violation of equal protection under the fourteenth amendment, nor has he ever cited any authority in support of an equal protection claim. In any event, we agree with the district court that Learned did not produce any evidence to support an equal protection claim. Summary judgment was therefore proper as to Learned's section 1983 claims.

III. ATTORNEYS' FEES

We do not believe that this appeal was entirely frivolous or taken in bad faith, and therefore deny Bellevue's request for attorneys' fees. *See Jensen v. Stangel*, 762 F.2d 815, 817 (9th Cir. 1985) (per curiam) (prevailing defendant in a section 1983 action may be awarded attorneys' fees if the action was frivolous, unreasonable, or without foundation); *Silver*, 586 F.2d at 143 (prevailing defendant in a Title VII appeal not entitled to attorneys' fees where the appeal was taken in good faith and the defendant was able to pay its own way).

CONCLUSION

Learned did not produce any evidence which could establish a violation of any rights under Title VII or any protected interest under section 1983. All other issues were either without merit or were not raised below. Accordingly, the judgment of the district court is AFFIRMED.

Supreme Court, U.S.
FILED
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No. 88-1188

In The

Supreme Court of the United States

October Term, 1988

STEVEN D. LEARNED,

Petitioner,

vs.

CITY OF BELLEVUE, a municipal corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should the mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination, automatically trigger the protection afforded under section 704(a) of Title VII regardless of whether the underlying discrimination can reasonably be perceived as discrimination prohibited by Title VII?

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REASON FOR DENYING THE PETITION

The decision of the Ninth Circuit is not in conflict with any other federal court of appeals decision with regard to the federal question presented by the Petitioner.

STATEMENT OF THE CASE

Petitioner, Steven Learned, a white male, has been employed by the respondent, City of Bellevue ("employer"), since 1975. In 1984 Learned filed a complaint in federal district court alleging that the employer had discriminated against him in violation of 42 U.S.C. §2000e-3 (section 704(a) of Title VII), and had deprived him of civil rights under the Fourteenth Amendment of the United States Constitution in violation of 42 U.S.C. §1983. Learned also alleged several pendent state claims for relief.

The district court granted the employer's motion for summary judgment and dismissed Learned's federal and pendent state claims. Learned appealed the dismissal of his federal claims to the Ninth Circuit which affirmed the dismissal. *Learned v. City of Bellevue,* 860 F.2d 928 (9th Cir. Nov. 3, 1988). Pursuant to his petition for a writ of certiorari, Learned seeks review by this Court of the dismissal of his Title VII claims.

FEDERAL QUESTION PRESENTED

In support of his petition, Learned contends that, "[T]his case presents an important federal question under

Title VII of the Civil Rights Act which answers (sic) are now in conflict among the Federal Circuit and District Courts." (Petition, p. 6) Learned characterizes this federal question as follows:

> "Must the conduct which is opposed actually violate Title VII to sustain a federal claim of employer retaliation." (Petition, p. 6)

This statement misrepresents the holding of the Ninth Circuit which applied the "reasonable belief" standard that has been adopted by all federal circuits addressing the same issue.

Decision of the Ninth Circuit

Learned contended on appeal to the Ninth Circuit that the district court erred in granting summary judgment on his claim under the anti-retaliation provision of section 704(a) of Title VII. Learned, however, never alleged nor argued that he opposed any discrimination based upon race, color, religion, sex, national origin or any other classification arguably protected under Title VII. Learned alleged only that the retaliation by the employer was related to his filing of a state industrial insurance lawsuit in state court and to his opposition to what he believed was discrimination based upon his physical and mental limitations.

Learned does not contend that the employer engaged in discrimination which is prohibited under Title VII. Instead, Learned contends that it doesn't matter whether the alleged discrimination he opposed is, or can reasonably be perceived to be, prohibited by Title VII, but only

whether Learned, as a totally subjective matter, reasonably believed such discrimination was in violation of Title VII.

The Ninth Circuit rejected Learned's argument, concluding with regard to the "opposition clause" claim that:

> "Although courts liberally construe the provisions of section 704(a) to effectuate the remedial purposes of the Act, see, e.g., *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978), the opposition clause, by its terms, protects only those employees who oppose what they reasonably perceive as discrimination under the Act. An employee need not establish that the opposed conduct in fact violated the Act in order to establish a valid claim of retaliation. *Id.* That is, an employee may fail to prove an "unlawful employment practice" and nevertheless prevail on his claim of unlawful retaliation. However, the opposed conduct must fairly fall within the protection of Title VII to sustain a claim of unlawful retaliation. (cites omitted) *Learned v. Bellevue* at 932.

The Ninth Circuit further concluded with regard to the "participation clause" claim that:

> "The participation clause is broadly construed to protect employees who utilize the tools provided by Congress to protect their rights. *Sias*, 588 F.2d at 695. As with the opposition clause, it is not necessary to prove that the underlying discrimination in fact violated Title VII in order to prevail in an action charging unlawful retaliation. *Id.* "If the availability of that protection were to turn on whether the employee's charge were ultimately found to be meritorious, resort to the remedies provided by the Act would be severely chilled." *Id.* (citation omitted) *Learned v. Bellevue* at 932.

Under no reasonable reading of the Ninth Circuit's decision can it be contended that the Ninth Circuit required

proof that the employer's action was actually in violation of Title VII in order to sustain a claim of retaliation under section 704(a); yet this is precisely the issue Learned presents to this Court for review.

CONFLICT BETWEEN THE CIRCUITS

Learned contends that a conflict exists between the decisions of the circuit and district courts regarding the nature of the protection provided by the "opposition" and "participation" clauses of section 704(a). Learned characterizes this conflict in his "Questions Presented" as follows:

> Whether the practice opposed under the "opposition clause" of Title VII, section 704(a) must be a violation of the Act to sustain a federal action for retaliation or whether it can be based upon the reasonable belief of the employee at the time he files his discrimination claim with the state and federal agencies?" (Petition, p. i).

Learned, however, has never cited any case, nor is the employer aware of any case, which supports his contention that the protection of the "opposition" and "participation" clauses of section 704(a) applies to anyone having a reasonable belief that he opposes an unlawful practice under Title VII regardless of whether the discrimination opposed can reasonably be perceived as violating Title VII.

In fact, there is no conflict between the federal circuits regarding the standard of protection afforded by section 704(a). The Ninth Circuit applied the same standard in the instant case that has been adopted by all other federal circuits considering the same matter:

> The mere fact that an employee is participating in an investigation or proceeding involving charges of some sort of discrimination, however, does not automatically trigger the protection afforded under section 704(a): the underlying discrimination must be reasonably perceived as discrimination prohibited by Title VII. *Learned v. Bellevue* at 932.

The Ninth Circuit previously adopted this "reasonable belief" standard in *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978); reiterating its opinion in *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1013 (9th Cir. 1983) that:

> The employee's statement cannot be "opposed to an unlawful employment practice" unless it refers to some practice by the employer that is allegedly unlawful. It is not necessary, however, that the practice be demonstratively unlawful; opposition clause protection will be accorded whenever the opposition is based on a "reasonable belief" that the employer has engaged in an unlawful employment practice. (cites omitted)

The Tenth Circuit in *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) recognized that there is no conflict in the circuit courts with regard to this issue, concluding that:

> Every circuit that has considered the issue, however, has concluded that opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated. See, e.g., *Rucker v. Higher Education Aids Board*, 669 F.2d 1179, 1182 (7th Cir. 1982); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976, 102 S.Ct. 1485, 71 L.Ed.2d 688 (1982); *Payne v. McLemore's Wholesale and Retail Stores*, 654 F.2d 1130, 1137-40 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); *Parker v. Baltimore and Ohio*

Railroad Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Monteiro v. Poole Silver Co.*, 615 F.2d 4, 8 (1st Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978); see also *Mitchell v. Visser*, 529 F.Supp. 1034, 1043 (D.Kan.1981).

The conflict that Learned claims exists is not between the "subjective" standard (which he champions but no federal court has adopted) and the "reasonable belief" standard which the Ninth Circuit applied. Rather, it is an alleged conflict between the "reasonable belief" standard and a more stringent standard requiring proof of an actual violation of Title VII to trigger the protection of section 704(a). However, even if such a conflict exists, which the employer contends does not, it is completely irrelevant to the issue in the instant case. Neither party contends that an "actual violation" standard applies; nor did the Ninth Circuit apply an "actual violation" standard in reaching its decision. This "conflict" appears to be cited solely for the purpose of satisfying the review criteria of Supreme Court Rule 17.

Actual Violation Standard

In support of his contention that a conflict exists, Learned cites a prior Ninth Circuit decision, *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) and two other district court decisions as adopting the "actual violation" standard. In fact, the only case cited by Learned that adopts the "actual violation" standard, *EEOC v. C&D Sportswear Corp.*, 398 F.Supp. 300 (M.D.Ga. 1975) was specifically criticized and not followed by the Fifth

Circuit in *Payne v. McLemore's Wholesale and Resale Stores*, 654 F.2d 1130, 1139 n.9 (5th Cir. 1981).[1]

Reasonable Belief Standard

It is also apparent that Learned misconstrues the "reasonable belief" standard applied by the Ninth Circuit. While that standard does in fact afford protection to those employees who have a "reasonable belief" that the employer has discriminated under Title VII, such discrimination must arguably be in violation of Title VII. In each circuit court decision cited by Learned as adopting the "reasonable belief" standard, the activity of the employer complained of was, contrary to the instant case, discrimination arguably in violation of Title VII.[2]

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[1] *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) cited by Learned, does not adopt the "actual violation" standard. In Silver the plaintiff opposed the racially discriminatory acts of a co-worker. The Ninth Circuit dismissed the plaintiff's "opposition" clause claim, concluding that the opposition must be directed at an unlawful employment practice of the employer and not an act of discrimination by an employee whose actions the employer is not legally responsible for. See *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983) wherein the Ninth Circuit distinguished its decision in *Silver*. See also *Blizzard v. Newport News Redevelopment & Housing Authority*, 670 F.Supp. 1337, 1343 n.5 (E.D. Va. 1984) which further analyzes and distinguishes *Silver*.

[2] *DeAnda v. St. Joseph Hospital*, 671 F.2d 850 (5th Cir. 1982) (discrimination based on race); *Payne v. McLemore's Wholesale and Retail Stores, supra* (discrimination based on race); *Rucker v. Higher Education Aids Board*, 669 F.2d 1179 (7th Cir. 1982) (discrimination based on sex and race); *Berg v. LaCrosse Cooler*

(Continued on following page)

Learned has never contended that the alleged discrimination he opposed was in violation of Title VII. Under Learned's argument, if a person has a reasonable belief (perhaps based on the advice of his attorney) that Title VII prohibits discrimination against blue-eyed people, his opposition to such discrimination would be protected under section 704(a). No federal court has adopted this standard.

CONCLUSION

The decision of the Ninth Circuit is not in conflict with a decision of any federal court of appeals; nor is there any other reason to grant review of this matter. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Company, 612 F.2d 1041 (7th Cir. 1980) (discrimination based on sex); *Monteiro v. Poole Silver Company*, 615 F.2d 4 (1st Cir. 1980) (discrimination based on race); *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984) (discrimination based on sex); *Zack v. City of Minneapolis*, 35 FEP 1572 (D.Minn. 1984) (discrimination based on sex); *Croushorn v. Board of Trustees of the Univ. of Tenn.*, 518 F.Supp. 9 (D.Tenn. 1980) (discrimination based on race).